In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 651

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

FRISCO TRANSPORTATION COMPANY, APPELLEE

On Appeal from the United States District Court for the Eastern District of Missouri, Eastern Division

---

REPLY OF THE INTERSTATE COMMERCE COMMISSION TO APPELLEE'S MOTION TO AFFIRM

In reply to the appellee's motion to affirm the judgment, we would refer to two matters not included in our Jurisdictional Statement.

1. At page 13 of the Commission's Jurisdictional Statement, it is stated that "So far as we know, such errors in the issuance of certificates have been relatively few in number." Since then, there has been instituted in the United States District Court for the Middle District of Tennessee a suit entitled *Tompkins Motor Lines, Inc.* v. *United States and Interstate Commerce Commission* (Civil Action File No. 2436), alleging that in the course of clarifying a competing

motor carrier's certificate of public convenience and necessity, and without notice to the plaintiff, the Commission granted operating authority which had not been requested by the applicant or supported by evidence of public convenience and necessity. The Commission has decided, subject to this Court's action on this appeal, to reopen the application proceeding for a hearing to determine whether through error or inadvertence it issued a certificate broader than its findings and the supporting evidence. If, contrary to our view, the Commission is without power to correct such an error in a certificate, then the *Tompkins* case will present the question of whether the courts have the power to do so. While we concede that such a power to correct should reside somewhere, it would be anomalous to hold that the courts can require the Commission to do what it cannot do on its own initiative. Cf. *Murphy Motor Lines* v. *United States*, 148 F. Supp. 471, affirmed *per curiam* by this Court on October 14, 1957.

2. In the motion to affirm (p. 20) the appellee asserts that "There is literally no evidence in the record upon which a finding of inadvertence could be based. No employee of the Commission was called to describe the procedure followed in issuing the certificates." To the contrary, the Commission in its first report (53 M.C.C. at 424-425) took official notice of its own internal procedures under which the actual preparation and issuance of certificates is routinely performed by employees of the Commission who, of course, are without authority to issue a certificate broader than

the Commission's findings. We submit that the Commission or any other tribunal may take official (or judicial) notice of its own internal procedures. Moreover, this Court has emphasized repeatedly the inability in employees of the Commission or even in a member of the Commission to exercise powers vested only in the Commission. *Minneapolis & St. Louis R.R. Co. v. Peoria, etc. Ry. Co.*, 270 U.S. 580, 585; *Thompson* v. *Texas Mexican R. Co.*, 328 U.S. 134, 146.

Respectfully submitted,

ROBERT W. GINNANE
General Counsel

CHARLIE H. JOHNS, JR.
Associate General Counsel
Interstate Commerce Commission
Washington 25, D. C.

January 23, 1958

☆ U. S. GOVERNMENT PRINTING OFFICE: 1958 453198 945